Consultation on a new European approach to business failure and insolvency

I. Background Information

Please indicate your role for the purpose of this consultation -single choice reply-(compulsory)	Public authority
Have you had practical experience with insolvency proceedings and if so, in what capacity? -single choice reply-(compulsory)	Yes
If so, -single choice reply-(compulsory)	as other legal practitioner
Please indicate the country where you are located -single choice reply-(compulsory)	Netherlands

Please provide your contact information (name, address and email-address) -open reply-(compulsory)

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II. Selected areas where the divergence of national law may create problems for the internal market

1. Second chance for entrepreneurs in honest bankruptcies

Q1. Which of the following measures would you consider as the most efficient in order to reinforce a second chance for honest entrepreneurs? -multiple choices reply-(optional)	
Q2. Do you support the European objective to limit the discharge and debt settlement period to a maximum of three years in order to facilitate second chance? -single choice reply-(optional)	Yes

2. Conditions for opening insolvency proceedings

Q3. In your view, do the differences in national law for the opening of insolvency proceedings (insolvency test and/or timeframe) create problems for businesses operating in the internal market? -single choice reply-(optional)	Yes

Please specify -open reply-(optional)

It confronts undertakings operating in the internal market with diverging procedures for the opening of insolvency proceedings, which adds to their administrative burden.

Q4. In your view, does the divergence of national laws on the following issues create	

problems? -multiple choices reply-(optional)	

3. National legal frameworks for restructuring plans

Q5. In your view, is there a need to eliminate all or some of the divergences of national rules regulating restructuring plans? -single choice reply-(optional)	Yes
Please specify -single choice reply-(optional)	Other

Please specify -open reply-(optional)

The restructuring of groups of undertakings operating in various EU-countries.

4. Special arrangements for SMEs

Q6. Does simplified and cost-efficient insolvency scheme for SMEs exist in your Member State? -single choice reply-(optional)	No

If no, has the absence of such schemes led to problems? Please specify. -open reply-(optional)

Are you aware of any problems which SMEs as creditors encounter? If yes, please specify. -open reply-(optional)

Many sme's, being a creditor, do not qualify for restitution in case of insolvency because of their "low ranking" as a creditor.

Q7. Are the following types of procedures available to SMEs in your Member State? -multiple choices reply-(optional)	Out-of-court settlement and voluntary arrangements - Early warning systems and pre-insolvency proceedings - Personal insolvency schemes and civil bankruptcy
Q8. Which of the following aspects should be improved in view of making insolvency proceedings more efficient and effective for SMEs? -multiple choices reply-(optional)	

5. Status, power and supervision of liquidators

Q9. Do you consider that the divergence of national laws with respect to the issues set out below has created problems in cross-border insolvency proceedings? -multiple choices reply-(optional)	

6. Directors' duties and liability and professional disqualifications

Q10. In your view, are there problems with the enforcement of liability claims against the directors of insolvent companies within the EU? -single choice reply-(optional)	Yes

Please specify: -open reply-(optional)

In case of a "chain" of legal persons, one managing the other, in transboundary situations, there may be problems in effectuating the liability of directors in cases where one or more "foreign" managing companies are involved, as their relationship is governed by foreign law. E.g. company A founded according to Dutch law is managed by an English ltd, which, in turn, is managed by another English ltd,

which was founded by mr. X. It appears extremely complicated in pratice to invoke the personal liability of mr. X in cases of mismanagement, fraud etc. in or by the Dutch company A, as -according to private international law- his personal responsibility is governed by English law. Consequently, adding one or more foreign managing companies to a management structure may prove to be a route to escape or reduce personal liability of directors in case of mismanagement and fraud.

Q11. In your view, have the regulatory gaps in the liability regime outlined above led to any problems in practice? -single choice reply-(optional)	Yes

Please specify (regulatory arbitrage, difficulties of compliance with divergent liability rules for managers, ...) and how should these problems best be solved? -open reply-(optional)

Mechanisms should be developed to aviod that companies transfer their COMI just before insolvency proceedings are opened, in order to have their insolvency settled according to a legal regime in the EU that is most beneficial to them. Such a COMI-transferral may be qualified as abusive, as it obviously goes to the detriment of creditors and employees.

Q12. In your view, is there a need to take action at EU level with a view to preventing disqualified directors from heading companies in another Member State? -single choice reply-(optional)	Yes
Please specify -single choice reply-(optional)	by ensuring that information on national disqualification orders is available to the relevant authorities in other Member States?

7. Avoidance actions

Q13. In your view, has the divergence within the EU of the conditions under which a detrimental act can be avoided created problems in practice? -single choice reply-(optional)	

III. Other Issues

Q14. In your view, are there any other issues where the divergence of national law creates problems for the internal market? -open reply-(optional)

For your information, it is mentioned that Dutch insolvency law is currently being revised. The latest state of play is summarized in the document attached. This is a provisional response of the Dutch authorities, which may be supplemented before 1 November 2013, in order to take account of the most recent developments.

Do you want to upload a file? -open reply-(optional)	